



2006 Post-Award Motion Hearing transcript; the February 19, 2009 Motion Hearing transcript with attached exhibits; the record set forth in the June 20, 2006 Award and June 26, 2006 Award Nunc Pro Tunc entered by Special Administrative Law Judge Marvin Appling; and the administrative file compiled by the Director of the Division of Workers Compensation.

### **ISSUES**

This is a proceeding to review and modify an award in which Janine L. Hurlburt received permanent partial disability benefits under K.S.A. 44-510d for a 7.65 percent impairment to the right upper extremity at the forearm level and a 7.65 percent impairment to the left upper extremity at the forearm level. In the July 27, 2009 Review and Modification award, Judge Klein denied Janine L. Hurlburt's request for permanent total disability benefits. Ms. Hurlburt appealed that decision to this Board. Shortly after perfecting this appeal, Ms. Hurlburt died.

Claimant contends the record contains substantial evidence to prove a permanent total disability. Claimant asserts the evidence establishes that Janine L. Hurlburt sustained physical injuries in the course of her employment and she also suffered exacerbating psychological effects as a result of her physical injuries. And based on the totality of the circumstances and the evidence presented, claimant maintains she has proven permanent total disability, as that term is used in K.S.A. 44-510c(a)(2). Claimant requests an award of permanent total disability compensation.

Respondent contends there was no change in Janine L. Hurlburt's impairment rating nor any change in her condition or disability as a result of her work-related injuries.

The issue is:

- Is claimant entitled to modification of the prior award?

### **MOTION TO SUBSTITUTE CLAIMANT**

In a November 18, 2009 Order, the Board found that upon Janine L. Hurlburt's death, there was no longer a claimant in this proceeding to pursue benefits. Consequently, the Board found a legal representative must be substituted in Ms. Hurlburt's place before the appeal could proceed.

Mr. Craig filed a Motion to Substitute Claimant on January 15, 2010, requesting that Jacqueline M. Hurlburt, Janine L. Hurlburt's sister, heir and executrix of her estate, be substituted for the decedent/claimant, Janine L. Hurlburt. In support of the motion, Mr. Craig produced Janine L. Hurlburt's last will and testament naming Jacqueline M.

Hurlburt as her sole heir and executrix. By e-mail dated January 29, 2010, respondent's attorney stated respondent had no objection to the motion.

The Board hereby grants the motion to substitute Jacqueline M. Hurlburt as the claimant for the decedent.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record and considering the parties' arguments, the Board finds and concludes:

Janine L. Hurlburt filed an application for review and modification on February 4, 2009, contending that she was permanently and totally disabled as a result of the work-related injuries she sustained through January 8, 2005, while working for the respondent.

For purposes of this Order, the Board finds it is not necessary to repeat in detail the facts of the case, which were thoroughly and accurately stated in the Board's November 21, 2006 Order and the Board's December 31, 2008 Order. But, rather, the orders are incorporated by reference.<sup>3</sup>

At the review and modification hearing conducted on April 16, 2009, Janine L. Hurlburt testified that her depression coupled with the acceleration of her arm and hand problems led to her being totally disabled.<sup>4</sup> She further testified that her depression had gotten worse because she could not work.<sup>5</sup> Ms. Hurlburt had been on antidepressant medication since before her injury. She had not worked since losing her job with respondent in 2005 and she was receiving Social Security disability benefits.

Ms. Hurlburt had a history of many medical maladies. She had suffered from obesity, diabetes and depression. While employed by respondent, Ms. Hurlburt had a 65-pound tumor removed. In the last few years before her death, she had developed and experienced the following conditions: hernia requiring surgery, sleep apnea, pulmonary hypertension, chronic staph infection, panniculectomy (surgery to remove 45 pounds of soft tissue) and cardiac issues. The record also indicates Ms. Hurlburt had hyperlipidemia and had experienced a stroke.

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<sup>3</sup> *Hurlburt v. T-Mobile USA, Inc.*, No. 1,021,535, 2008 WL 5484142 (Kan. WCAB Dec. 31, 2008); *Hurlburt v. T-Mobile USA, Inc.*, No. 1,021,535, 2006 WL 3598275 (Kan. WCAB Nov. 21, 2006).

<sup>4</sup> R.M.H. Trans. at 10.

<sup>5</sup> *Id.*, at 35, 36.

At the request of her attorney, Dr. Michael H. Munhall, who is board certified in physical medicine and rehabilitation, examined and evaluated Ms. Hurlburt for purposes of the review and modification proceeding. Dr. Munhall opined that Ms. Hurlburt's diabetes, depression and obesity were her main medical preexisting conditions and were not work related. Dr. Munhall diagnosed Ms. Hurlburt with bilateral carpal tunnel syndrome releases and neuroemotional dysfunction. He opined that the neuroemotional dysfunction had a relationship to the work-related injuries Ms. Hurlburt sustained. In Dr. Munhall's opinion, based on Ms. Hurlburt's physical and psychological conditions, he determined that she was permanently and totally disabled from employment. It should be noted that Dr. Munhall did not perform any psychological tests on Ms. Hurlburt during his one hour of examination and evaluation.

Dr. J. Mark Melhorn, a hand specialist, reevaluated Ms. Hurlburt on May 7, 2009, at the request of respondent's attorney. Dr. Melhorn originally treated Ms. Hurlburt in 2005 and performed carpal tunnel release surgeries on both of her upper extremities that year. He diagnosed Ms. Hurlburt with residual symptoms, right and left forearms, consistent with previous carpal tunnel syndrome. He opined that Ms. Hurlburt's functional capacity and physical impairment relative to her bilateral carpal tunnel syndrome had not changed since April 2005, when he rated her. He further opined that Ms. Hurlburt's ability to perform gainful work had probably decreased based on her age, body habitus and diabetes. Lastly, Dr. Melhorn opined Ms. Hurlburt was not permanently and totally disabled as a result of her diagnosis of bilateral carpal tunnel syndrome.

An award may be modified when changed circumstances either increase or decrease the permanent partial general disability. The Workers Compensation Act provides, in part:

Any award or modification thereof agreed upon by the parties, except lump-sum settlements approved by the director or administrative law judge, whether the award provides for compensation into the future or whether it does not, may be reviewed by the administrative law judge for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party. In connection with such review, the administrative law judge may appoint one or two health care providers to examine the employee and report to the administrative law judge. The administrative law judge shall hear all competent evidence offered and if the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such award, or reinstate a prior award, upon

such terms as may be just, by increasing or diminishing the compensation subject to the limitations provided in the workers compensation act.<sup>6</sup>

K.S.A. 44-528 permits modification of an award in order to conform to changed conditions.<sup>7</sup> In a review and modification proceeding, the burden of establishing the changed conditions is on the party asserting them.<sup>8</sup> Our appellate courts have consistently held that there must be a change of circumstances, either in claimant's physical or employment status, to justify modification of an award.<sup>9</sup>

The question for the Board is whether Ms. Hurlburt's functional impairment or disability increased.

Dr. Melhorn, who provided treatment for Ms. Hurlburt's work-related injuries and performed the bilateral carpal tunnel release surgeries, opined that her functional impairment relative to her work-related injuries had not changed. He further opined that Ms. Hurlburt could have worked with restrictions.<sup>10</sup> And as such, she was not permanently and totally disabled as a result of her diagnosis of bilateral carpal tunnel syndrome. Dr. Melhorn opined that Ms. Hurlburt's ability to perform gainful work had probably diminished due to her age, body habitus and diabetes.

Dr. Munhall opined that Ms. Hurlburt had an evolution of bilateral hand numbness, tingling, and pain that unmasked aggravated preexisting depression, caused a cascade of biomedical changes, leading to an increase in her diabetes, lack/loss of control of her diabetes, aggravation of her depression and, thereafter, leading to chronic pain syndrome involving both hands.<sup>11</sup> He further opined Ms. Hurlburt was permanently and totally disabled. Dr. Munhall's opinions as to causation and disability were based on both Ms. Hurlburt's physical and psychological conditions.

The Board finds Dr. Melhorn's opinions more credible than those of Dr. Munhall. Dr. Melhorn treated and performed surgery on Ms. Hurlburt and is a hand specialist.

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<sup>6</sup> K.S.A. 44-528.

<sup>7</sup> *Nance v. Harvey County*, 263 Kan. 542, Syl. ¶ 1, 952 P.2d 411 (1997).

<sup>8</sup> *Morris v. Kansas City Bd. of Public Util.*, 3 Kan. App. 2d 527, 531, 598 P.2d 544 (1979).

<sup>9</sup> See, e.g., *Gile v. Associated Co.*, 223 Kan. 739, 576 P.2d 663 (1978); *Coffee v. Fleming Company, Inc.*, 199 Kan. 453, 430 P.2d 259 (1967).

<sup>10</sup> Melhorn Depo., Ex. 2.

<sup>11</sup> Munhall Depo. at 10.

Dr. Munhall performed no psychological tests on Ms. Hurlburt, he reviewed no psychological records and, thus, he failed to be persuasive on how her psychological condition was related to her physical condition.

The Board finds that the claimant failed to prove that Janine L. Hurlburt's work-related condition, impairments or disability increased. Accordingly, claimant is not entitled to modification of the prior award.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>12</sup> Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

**AWARD**

**WHEREFORE**, it is the Board's finding, decision and order that the ALJ's July 27, 2009 Review and Modification award is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of June, 2010.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: W. Walter Craig, Attorney for Jacqueline M. Hurlburt  
William L. Townsley, III, Attorney for Respondent and its Insurance Carrier  
Thomas Klein, Administrative Law Judge

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<sup>12</sup> K.S.A. 2009 Supp. 44-555c(k).